International Harvester Company, Columbus Plastics Operation *and* Byrd Hodge. Case 9-CA-20011

31 July 1984

DECISION AND ORDER REMANDING

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 2 March 1984 Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a memorandum in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand this proceeding to the judge for a further hearing and for a supplemental decision.

The complaint alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by discharging Byrd Hodge. Relying on *United Technologies Corp.*, 268 NLRB 557 (1984), the judge found that the issues raised by the complaint should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement. For the reasons set forth below, we disagree.

Hodge filed a charge on 18 August 1983 alleging that the Respondent had refused to allow him to take a restroom break in retaliation for his grievance-filing activity. On 13 September 1983 Hodge filed an amended charge which, among other things, alleged that he had been discharged on 30 August 1983 in retaliation for filing his original charge with the Board. Following issuance of the complaint, a hearing was held before the judge on 13 November 1983. In its posthearing brief, the Respondent asserted that "this matter is not before this tribunal because the same issues have been raised in an arbitration proceeding pursuant to the parties agreed upon grievance process for resolving disputes of this kind." Relying on this statement and the disclosure at hearing that the Union had requested arbitration of Hodge's discharge, the judge issued an order to show cause why this case should not be deferred to arbitration in accord with *United Technologies*. Both the Respondent and the General Counsel responded to the judge's order. The Respondent argued that the Board should defer. The General Counsel argued that deferral was contrary to Board law and that *United Technologies* did not modify the Board's well-established position that it would not defer alleged violations of Section 8(a)(4) to private dispute resolution. The General Counsel further contends that the alleged violation of Section 8(a)(4) is so intertwined with the alleged violations of Section 8(a)(3) and (1) that deferral is inappropriate for all issues raised in the complaint.

The Board has consistently held that allegations of an employer's violation of Section 8(a)(4) will not be deferred to arbitration. In *United Technologies*, the Board returned to the deferral policy originally established in *Collyer Insulated Wire*[1] and made clear that the Board will now defer to arbitration complaints alleging a violation of Section 8(a)(1), (3), or (5) where the underlying issues are cognizable under the grievance-arbitration provisions of the parties' collective-bargaining agreement. *United Technologies* does not address the Board's established position concerning alleged violations of Section 8(a)(4). The resolution of questions concerning access to Board processes has always been held to be solely within the Board's province to decide. *McKinley Transport Ltd.*, 219 NLRB 1148, 1151 (1975). In *Filmation Associates*,[2] the Board stated:

> The prohibition expressed in Section 8(a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes. *In our view the duty to preserve the Board's processes from abuse is a function of this Board and may not be delegated to the parties or an arbitrator.* [Emphasis added.]

In addition, we find that where, as here, there are alleged violations of Section 8(a)(3) and (1) that are "closely intertwined" with the allegations involving Section 8(a)(4), deferral of those statutory issues is equally inappropriate. To hold otherwise would be contrary to the Board's established policy.[3] Moreover, it would be inefficient for the judge to resolve only the alleged violation of Section 8(a)(4) and not the related allegations concerning Section 8(a)(3) and (1) where, as here, a hearing on all the alleged violations has already been held. Accordingly, we will not defer resolution of the alleged violations of Section 8(a)(4), (3), and (1) in this case to arbitration and will instead remand

[1] 192 NLRB 837 (1971). This policy had been largely abandoned by the Board in *General American Transportation*, 228 NLRB 808 (1977).

[2] 227 NLRB 1721 (1977). Accord: *Postal Service*, 227 NLRB 1826 (1977).

[3] *Filmation Associates*, supra at 1722.

the case to the judge for consideration on the merits consistent with this decision.

ORDER

It is ordered that this proceeding be remanded to Administrative Law Judge Lowell Goerlich for a full decision on the merits of the allegations in the complaint and for an appropriate order. Thereafter, any party may within the time prescribed by Section 102.46 of the Board's Rules and Regulations file exceptions to the judge's decision.

MEMBER ZIMMERMAN, concurring.

I agree with my colleagues that the Board's interest in protecting access to its processes requires that the resolution of any alleged violation of Section 8(a)(4) not be deferred to arbitration. Further, as I stated in my dissenting opinion in *United Technologies Corp.*, 268 NLRB 557 (1984), I would limit deferral to cases involving contractual interpretation consistent with the Board's well-reasoned *Collyer* rationale. Accordingly, I concur in the majority's finding that deferral of the alleged violations of both Section 8(a)(3) and (4) of the Act is inappropriate.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charge in this case filed by Byrd Hodge, an individual, on August 18, 1983, was served on International Harvester Company, Columbus Plastics Operation (Respondent) by certified mail on the same date. An amended charge filed by Hodge on September 13, 1983, was served by certified mail on the Respondent on the same date. A complaint and notice of hearing issued on September 30, 1983. In the complaint it was alleged that the Respondent had discharged employee Byrd Hodge on August 30, 1983, in violation of Section 8(a)(3) and (4) of the National Labor Relations Act (the Act). Additionally it was alleged that the Respondent threatened and coerced an employee because he filed grievances pursuant to the terms of a collective-bargaining agreement.

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The matter came for hearing on November 13, 1983, at Columbus, Ohio. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all times material herein, the Respondent, a Delaware corporation with an office and place of business in Columbus, Ohio, herein called the Respondent's facility, has been engaged in the manufacture of fiberglass truck hoods.

During the calendar year ending August 30, 1983, the Respondent, in the course and conduct of its business operations described above, purchased and received at its Columbus, Ohio facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio.

The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Association of Machinists, Local 1471, AFL–CIO (the Union), is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE QUESTION OF DEFERRAL TO ARBITRATION

On January 30, 1984, I issued an Order to Show Cause why the within case should not be deferred to arbitration in conformity with the Board's decision in the case of *United Technologies Corp.*, 268 NLRB 557 (1984). The parties were allowed until February 15, 1984, to respond. The General Counsel and the Respondent responded within the rule. The Respondent urged that this matter be deferred to arbitration; the General Counsel opposed deferral on the ground that in the complaint it also was alleged that the Respondent violated Section 8(a)(4) of the Act.[1]

In the complaint it is alleged that employee Hodge was discharged on August 30, 1983, in violation of Section 8(a)(4) of the Act because he filed a charge with the Board on August 18, 1983,[2] and that employee Hodge was discharged on August 30, 1983, in violation of Section 8(a)(3) of the Act because of his union activities.

The incident which provoked Hodge's discharge is as follows: On August 30, 1983, around 12 p.m., General Foreman Rawlings was approaching the cafeteria; Hodge was walking toward him, Rawlings said, "Hi Byrd." Hodge looked at Rawlings and replied, "You're dirty" and "threw a piece of paper toward the garbage can." Hodge stopped at the cafeteria door and again said, "you're dirty." Rawlings responded, "what" and

[1] In support of this contention the General Counsel cited: *United States Steel Corp.*, 264 NLRB 76 (1982); *Narragansett Restaurant Corp.*, 243 NLRB 125 (1979); *Postal Service*, 227 NLRB 1826 (1977); *McKinley Transport Ltd.*, 219 NLRB 1148 (1975); and *Filmation Associates, Inc.*, 227 NLRB 1721 (1977). These cases must be viewed within the teachings of *United Technologies*, above.

[2] The charge read: "On or about June 8, 1983 the above-named employer refused to allow the undersigned to take a restroom break contrary to its past practice and in retaliation for his grievance filing activity."

"shook" his head. Hodge retorted, "Don't shake you head at me, mother-fucker." Rawlings replied, "Byrd, you call me mother-fucker again, I'll stop your time. Now, pick up that paper, put it in the garbage can. If you want to talk, we'll talk." Hodge picked up the paper and threw it in the can. He then walked toward Rawlings, "got right up close" to him, "got his finger up like this," and exclaimed, "You're not only a mother-fucker, you're a cocksucker, and its my word against yours." Hodge turned and walked into the cafeteria.

It is apparent that *United Technologies Corp.*, above, and *Olin Corp.*, 268 NLRB 573 (1984), have established new Board precedents in the field of arbitration deferral. *United Technologies* specifically overruled the case of *General American Transportation Corp.*, 228 NLRB 808 (1977), and thereby reinstituted the Board's prior policy of allowing 8(a)(3) violations to be deferred to the contractual arbitration process. Thus, it tacitly reinstated *National Radio Co.*, 198 NLRB 527 (1972), which was in effect overruled by *General American Transportation Corp.*, above.

In overruling *General American Transportation Corp.*, above, in *United Technologies Corp.*, above at 559, the Board used this language:

> Simply stated, *Collyer* worked well because it was premised on sound legal and pragmatic considerations. Accordingly, we believe it deserves to be resurrected and infused with renewed life.
>
> Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.
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> . . . .
>
> Contrary to the notion of the majority in *General American Transportation*, deferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*.[3]

And finally (at 560, fn. 17) "We simply hold that where contractual grievance-arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to these procedures."

[3] In *Olin Corp.*, above, 268 NLRB at 574, the Board said:
[T]he Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceeding by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act.

The language quoted above as well as the policy and teachings implicit in *United Technologies* is equally as applicable to an alleged violation of Section 8(a)(4) of the Act as it is to an alleged violation of Section 8(a)(3), (1), and (5) of the Act. As was noted by Member Penello in the case of *Postal Service*, 227 NLRB 1026, 1027 (1977), "Contrary to my colleagues, I would defer the 8(a)(4) issue herein to arbitration as I perceive no real distinction between Section 8(a)(3) and Section 8(a)(4) with respect to deferral, and would defer the 8(a)(3), 8(a)(4), and 8(a)(1) issues herein to arbitration."

I find nothing in the language, teachings, or implications in *United Technologies* which would lead me to a conclusion that it is not now the intention of the Board, in appropriate cases, such as the one before me, to defer to the arbitral process under the labor agreement. This is what I conclude that the resurrection of and infusion of new life in *Collyer* means.

Thus, I conclude that the issues raised by the complaint should be deferred to the grievance-arbitration provision of the collective-bargaining agreement.[4]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The issues raised by the complaint should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement under the principles of *United Technologies Corp.*, above.

Pursuant to Section 10(c) of the Act I issue the following recommended[5]

ORDER

The complaint is dismissed, provided that:

Jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

[4] The existing collective-bargaining agreement, dated July 1, 1983, between the Respondent and International Association of Machinists and Aerospace Workers, its District No. 28, Region 2, Lodge No. 1471 contains grievance-arbitration provisions which have been invoked in respect to Hodge's discharge.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."